

Attachment

Supreme Court No. 94970-1

Court of Appeals No. 48299-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of S.K-P., Minor Child,
Appellant,

AMICUS CURIAE BRIEF IN SUPPORT OF MOTION FOR REVIEW

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I. INTRODUCTION

Review should be granted under RAP 13.4(b)(3) and (4) because children's universal right to counsel in all dependency proceedings is a significant question of law under the Washington and federal constitutions, and an issue of substantial public interest that should be determined by the Supreme Court, especially when the Washington Supreme Court has explicitly left open and recognized the importance of the issue. Every year in the United States, there are over 3 million reports of child abuse and neglect, and over half a million children are confirmed victims of maltreatment.¹ Roughly 6,000 of these children live in Washington State.² Where the state intervenes, the child may become the focus of a dependency proceeding like the proceeding at issue here, a legal process that will determine a child's physical custodial status, immediate

¹ The Annie E. Casey Foundation, *Children who are subject to an investigated report*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/6220-children-who-are-subject-to-an-investigated-report?loc=1&loct=1#detailed/1/any/false/573,869,36,868,867/any/12940,12955> (last visited Oct. 12, 2017) (noting that there were over 3 million investigated reports of maltreatment in 2015, with similar numbers for prior years); *see also* CHILDREN'S BUREAU OF THE U.S. DEPT. OF HEALTH & HUMAN SERVS., *Child Welfare Outcomes 2010-2013 Report to Congress* 19, https://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf# (last visited Oct. 12, 2017) (reporting 679,000 confirmed maltreated children in 2013).

² The Annie E. Casey Foundation, *Children who are confirmed by child protective services as victims of maltreatment*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/6221-children-who-are-confirmed-by-child-protective-services-as-victims-of-maltreatment?loc=49&loct=2#detailed/2/any/false/573,869,36,868,867/any/12943,12942> (last visited Oct. 12, 2017) (noting that there were 5,884 children confirmed as victims of maltreatment in 2015).

living situation, and environment. In the course of a year, over 670,000 children spend time in state-run foster care systems in the United States.”³ Dependency proceedings directly impact children’s physical liberty in the most dramatic of ways—determining where a child will sleep and who will be present in her daily life. These interests are paramount, and the risks to children while in state custody are severe: national data confirms that children removed from the home are at serious risk of further maltreatment while in state custody, unnecessary placement in restrictive institutions, traumatic instability in the form of multiple moves among homes and facilities, the administration of psychotropic medications, and a variety of poor long-term outcomes. Specific groups of children who are overrepresented in foster care systems nationally (and in Washington State)—including children of color and LGBTQ/TGNC youth⁴—are also disproportionately victimized by these risks.

³ U.S. DEPT. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, *The AFCARS Report: Preliminary FY 2015 Estimates as of June 2016*, <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf> (last visited Oct. 12, 2017).

⁴ “LGBTQ” means lesbian, gay, bisexual, transgender, queer. See U.C. Davis Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual Resource Center, <https://lgbtqia.ucdavis.edu/educated/glossary.html> (last visited Oct 12, 2017). “TGNC” means transgender and nonconforming. See American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70(9) AM. PSYCHOLOGIST 832 (2015).

Amici urge this Court to accept review of this case, and to find that all dependency proceedings impact the fundamental physical liberty interests of all children who are subject to them. These liberty interests can only be fully protected when children are represented by counsel in the courtroom, in all circumstances and, critically, *before* they potentially fall victim to known risks of harm. National experts, advocates, and academics in the child welfare community all support the right to counsel for children in dependency proceedings. Further, the majority of states recognize a right to legal representation for children in dependency proceedings, and many have done so for decades, demonstrating that counsel is not only necessary but can be provided in a feasible and cost-effective manner.⁵

Amici agree that the federal and Washington state constitutions mandate counsel for all youth in all dependency proceedings—or, at a minimum, establish a presumption in favor of appointing counsel—for all the reasons S.K-P. presents. Rather than repeat S.K-P.’s arguments, *Amici* focus on the overwhelming national evidence that dependency proceedings pose risks to all children’s fundamental physical liberty interests, and the national trends that firmly support appointment of

⁵ See, e.g., Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 445, 514 (1978) (stating that two dozen states provided for mandatory appointment of lawyers for children as long ago as 1978).

counsel in all dependency cases. The interests at stake appropriately supported the conclusion of the court below to apply the mootness exception and hear this case; those interests are even more urgent here and support this Court granting review. *See* App. Pet. for Review 52-53.

II. IDENTITY AND INTERESTS OF *AMICI*

The identity and interest of *Amici* are set forth in *Amici*'s Motion for Leave to File *Amici Curiae* Brief, filed herewith.

III. STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case.

IV. DISCUSSION

A. Children's physical liberty interests are always at stake in dependency proceedings.

An individual's physical liberty interests are paramount in our constitutional system. It is also well-established that children have physical liberty rights and an interest in avoiding the state's unnecessary intrusion on that liberty. *See In re Dependency of MSR*, 174 Wn. 2d 1, 16 (2012) (en banc) (hereinafter "*MSR*"); *see also Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (concluding that children's liberty interests must be protected by due process); *In re Gault*, 387 U.S. 1, 36 (1967) (holding that the potential restraint of a child's physical liberty entitles him to due process protections); *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding

that school children have a physical liberty interest in freedom from wrongful or excessive corporal punishment). Dependency proceedings, during which the state may involuntarily remove a child from her home and place her without her consent in foster care, are inherently custodial proceedings that directly impact the child's physical liberty.⁶

Dependency proceedings implicate the most central questions in a child's life: "Where is home? Who takes care of me? Who are my parents, my siblings, my extended family and my classmates?"⁷ Add to those profound questions others such as: "Will I be safe while in state custody? Will I be institutionalized? Will I be moved involuntarily among facilities and homes? Will I be administered psychotropic medications? And will I have an advocate in court who has been trained to protect my rights?" These liberty concerns animate national child welfare policy and support the appointment of counsel.

- 1. National policy makers and courts recognize that children's physical liberty interests are impacted by dependency proceedings.**

⁶ *Ingraham*, 430 U.S. at 673-74 (providing that "the contours of this historic liberty interest . . . always have been thought to encompass freedom from bodily restraint"); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that liberty "denotes not merely freedom from bodily restraint but also the right . . . to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men").

⁷ Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*, 6 NEV. L.J. 966, 967 (2006).

Nationally, there are three primary goals for child protection: safety, permanency, and well-being.⁸ Each of these federal priorities emphasizes the child's wellbeing as a product of her physical environment.⁹ In a dependency proceeding, the court may allow the state to remove a child from her home, place her in foster care, institutionalize her, move her repeatedly, or require her to be administered psychotropic medications.¹⁰ Of the myriad well-recognized risks to children in dependency proceedings, *Amici* highlight four—maltreatment, institutionalization, instability, and involuntary medication—to illustrate the physical liberty interests of children in state custody.

The potential for abuse and neglect of children while in state custody in foster care is a terrible and well-documented phenomenon. The U.S. Department of Health and Human Services produces an annual report to Congress that assesses the safety and rates of maltreatment in state

⁸ See *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, U.S. DEPT. OF HEALTH & HUMAN SERVS., OFFICE ON CHILD ABUSE & NEGLECT 9, <https://www.childwelfare.gov/pubPDFs/foundation.pdf> (last visited Oct. 5, 2017).

⁹ *Id.*

¹⁰ See generally *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (“foster children in state custody are subject to placement in a wide array of [. . .] foster care placements, including institutional facilities where their physical liberty is greatly restricted”); *In re W.H.*, 25 A.3d 330, 336-37 (Pa. Super. Ct. 2011) (state agency may administer psychotropic drugs under statute providing that “the court may order the child to be examined . . . and may also order medical or surgical treatment of a child”). Moreover, the child's failure to comply with the court's orders may result in sanctions further affecting a child's liberty. *In re Dependency of A.K.*, 162 Wn. 2d 632 (2007) (discussing use of civil contempt on foster children by courts).

care—a measure that every state tracks.¹¹ The most recent report¹² found that, while the national rates of repeated maltreatment of all children (regardless of custodial situation) declined over a three-year period, the rates of confirmed maltreatment of children in foster care did not.¹³ In Washington, “[k]eeping children who are placed into out-of-home care safe is of paramount importance.”¹⁴

Every year, more than fifty thousand children are taken into state care and then placed in one of the most restrictive physical settings: an institution or group home.¹⁵ While experts agree that children do best in family settings, “one in seven children under the care of the child welfare system is placed in a group setting—even though for more than 40 percent of these children, there is no documented clinical or behavioral need that

¹¹ See, e.g., U.S. DEPT. OF HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, *Child Welfare Outcomes 2010-2014 Report to Congress*, <http://www.acf.hhs.gov/cb/research-data-technology/statistics-research/cwo> (last visited Oct. 5, 2017). These federal reports identify key benchmarks, including: (1) reduction of recurrent child abuse and neglect; (2) reduction of child abuse and/or neglect *in foster care*; (3) increasing permanency for children in foster care; (4) reducing time in foster care; (5) increasing placement stability; and (6) reducing the placement of young children in group homes or institutions. *Id.* at 7.

¹² *Id.*

¹³ *Id.* at 9.

¹⁴ Partners For Our Children, *2015 Annual Report of Child Welfare System Performance in Washington State* 17, http://www.partnersforourchildren.org/sites/default/files/2015AnnualReport_POC-letter.pdf (last visited Oct. 5, 2017).

¹⁵ See The Annie E. Casey Foundation, *Children in foster care by placement type*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/6247-children-in-foster-care-by-placement-type?loc=1&loct=1#detailed/1/any/false/869,36,868,867,133/2622,2621,2623,2620,2625,2624,2626/12994,12995> (last visited Oct. 5, 2017) (reporting annual numbers of foster kids placed in state institutions or group homes).

might warrant placing a child outside a family.”¹⁶ In Washington, hundreds of children find themselves in state institutions or group homes, and the number appears to be increasing.¹⁷ According to the U.S. Department of Health and Human Services, which tracks state data on the use of restrictive “congregate care” in detail, children are spending an average of eight to nine months in group placements, and more than a third of children remain in such settings even longer.¹⁸ This is not only an immediate restriction on physical liberty, but may have serious long-term impacts: “group placements have been shown to be developmentally harmful when used as long-term living situation.”¹⁹

Additionally, placement instability directly impacts the physical liberty of children in foster care. The federal government tracks placement stability,²⁰ and Washington State recognizes the trauma of placement instability in its annual report.²¹ The Washington Supreme

¹⁶ The Annie E. Casey Foundation, *Every Kid Needs a Family Policy Report 1* (2015), <http://www.aecf.org/m/resourcedoc/aecf-EveryKidNeedsAFamily-2015.pdf> (last visited Oct. 5, 2017).

¹⁷ *Children in foster care by placement type*, *supra* note 14 (reporting that the number of Washington children in institutions and group homes increased year over year from 2011-2014).

¹⁸ *Every Kid Needs a Family Policy Report 7*, *supra* note 15(citing federal data).

¹⁹ The Annie E. Casey Foundation, *Too Many Teens: Preventing Unnecessary Out-of-Home Placements* (2015), <http://www.aecf.org/m/resourcedoc/aecf-TooManyTeens-2015.pdf>.

²⁰ *Every Kid Needs a Family Policy Report*, *supra* note 15.

²¹ *2015 Annual Report of Child Welfare System Performance in Washington State*, *supra* note 13.

Court in *MSR* has expressly tied placement moves to children’s physical liberty. *MSR*, 174 Wn. 2d at 17 (citing *Braam v. State*, 150 Wn. 2d 689, 699 (2003)) (recognizing that the prospective risk of harm implicates the substantive due process rights of children in foster care). Section 74.13.310 of the Revised Code of Washington provides that “Placement disruptions can be harmful to children by denying them consistent and nurturing support.” And national policy and research recognize both the devastating emotional and physical harm to children’s brain development. Instability can “fundamentally and permanently alter the functioning of key neural systems involved in learning, memory, and self-regulation and the complex networks of neuronal connectivity among these systems.”²²

A further risk to children in state custody is the escalating rate of use of psychotropic medication for youth in foster care.²³ “[A] pressing issue confronting the United States child welfare and child protective services system,” national trends for medicating foster children are

²² Fisher, P. A., Mannering, A. M., Van Scoyoc, A., & Graham, A. M., *A translational neuroscience perspective on the importance of reducing placement instability among foster children*, 92(5) CHILD WELFARE 9-36 (2013).

²³ See Makie et al., *Psychotropic medication oversight for youth in foster care: A national perspective on state child welfare policy and practice guidelines*, 33 CHILDREN & YOUTH SERVS. REV. 2213, 2213 (2011).

alarming: 37 to 52% of youth in foster care are subjected to psychotropic medications, compared to approximately 4% in the general population.²⁴

Beyond the immediate risks to physical liberty that state care poses, the negative long term consequences for many children placed in foster care are quite grim:

According to the only national study of youth aging out of foster care, 38 percent had emotional problems, 50 percent had used illegal drugs, and 25 percent were involved with the legal system. . . . Only 48 percent of foster youth who had “aged out” of the system had graduated from high school at the time of discharge, and only 54 percent had graduated from high school two to four years after discharge. As adults, children who spent long periods of time in multiple foster care homes were more likely than other children to encounter problems such as unemployment, homelessness, and incarceration, as well as to experience early pregnancy.²⁵

²⁴ *Id.* at 2213 (citing variety of federal data sources). The law also permits the state to authorize evaluations of a “child’s physical or emotional condition, routine medical and dental examination and care, and all necessary emergency care” at the shelter care stage. RCW §13.34.060.

²⁵ See Child Trends Databank, *Foster Care: Indicators of Child and Youth Well-Being* 2 (Dec. 2015), https://www.childtrends.org/wp-content/uploads/2015/12/12_Foster_Care.pdf. Again, children of color and LGBTQ/TGNC youth are disproportionately represented in foster care, and disproportionately suffer negative outcomes. See, e.g., Oronde Miller et al., *Changing Course: Improving Outcomes for African American Males Involved with Child Welfare Systems* 4-5 (Mar. 2014), https://www.cssp.org/publications/child-welfare/alliance/Changing-Course_Improving-Outcomes-for-African-American-Males-Involved-with-Child-Welfare-Systems.pdf (explaining that African American males in foster care are less likely to be placed with relatives and more likely to be placed in congregate care); Shannan Wilber, Caitlin Ryan, & Jody Marksamer, *CWLA Best Practice Guidelines* 5-8 (2006), <https://familyproject.sfsu.edu/sites/default/files/bestpracticeslgbtyouth.pdf> (explaining that LGBTQ/TGNC youth are often harassed and discriminated against while in foster care).

Each of these outcomes is strongly correlated with traumas suffered while in state care and should be considered as part of the liberty risks at stake in all dependency cases and proceedings.

The Court of Appeals’ finding that a dependency proceeding does not put a child’s “personal freedom” at risk, App. Pet. for Review at 26, erroneously ignores the risks that trigger the right to counsel for all children.²⁶ Whether—in hindsight—a child subject to dependency proceedings is ultimately harmed by these risks cannot be the test for whether the risks impacted her physical liberty interests. *See Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (in determining whether liberty interest is present “we must look not to the ‘weight’ but to the *nature* of the interest at stake”) (emphasis in original); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (state must provide counsel to an indigent defendant in every felony prosecution, regardless of whether or not the defendant is ultimately incarcerated); *Douglas et al. v. California*, 372 U.S. 353 (1963) (appointment of counsel for indigent defendant cannot depend on merits of appeal); *see also Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 50 (1981) (Blackmun, dissenting) (right to counsel in

²⁶ Indeed, courts firmly recognize that the prospective risk of harm implicates the substantive due process rights of children in foster care. *E.g.*, *MSR*, 174 Wn. 2d at 17 (citing *Braam v. State*, 150 Wn. 2d 689, 699 (2003)); *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012); *Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 172-73, 175 (4th Cir 2010) (collecting cases).

termination proceeding cannot depend on retrospective review of merits of individual case). Providing counsel for all children in dependency proceeding protects against known liberty risks *before* they occur.

2. Liberty interests are at stake with every change in the custodial circumstances for a child.

The Washington Supreme Court has explicitly acknowledged that a child's physical liberty interest is at stake in dependency proceedings, noting:

the child in a dependency or termination proceeding may well face the loss of a physical liberty interest both because the child will be physically removed from the parent's home [. . .] or [. . .] put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another.

MSR, 174 Wn. 2d at 16. Likewise, the Court of Appeals agreed that a dependency proceeding “may implicate a child's physical liberty interest.” App. Pet. for Review 26. The court erroneously found, however, that this interest was “insufficient to compel the appointment of counsel in every dependency proceeding.” *Id.* All children in dependency proceedings are subject to the same contextual risks to their liberty interests such that the right to counsel attaches in all cases, regardless of their age, ability to direct counsel, outcomes, or the specific legal advocacy provided in their case.

As a threshold matter, the State's *parens patriae* duties and the special treatment of children cannot be used to justify standards that harm

their interests.²⁷ While the U.S. Supreme Court has confirmed that different standards can be applied to youth, it has also underscored that such differences are tolerated because they protect children's well-being. *Kent v. United States*, 383 U.S. 541, 555 (1966) (cautioning against curtailing children's rights in the name of protectiveness); *In re Gault*, 387 U.S. at 16 (rejecting argument that depriving children of due process in the courtroom was justifiable as in their best interest); *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (because "the government's overriding interest is to ensure that a child's safety and well-being are protected," children must be represented by counsel); *Perez-Funez v. Immigration & Naturalization Serv.*, 619 F. Supp. 656, 663 (C.D. Cal. 1985) (INS's "good intentions" regarding procedure for unaccompanied minors insufficient to abrogate children's due process rights).

Further, it is evident from U.S. Supreme Court jurisprudence that a change in custody implicates a child's physical and personal liberty interests. In other contexts, the Court has repeatedly held that individuals

²⁷ The state's role as *de facto* parent is safety driven and not in hindsight. *Tamas v. Dep't of Social & Health Servs.*, 630 F.3d 833, 843 (9th Cir. 2010); *see also Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) ("The state's action in assuming the responsibility of finding and keeping the [foster] child in a safe environment placed an obligation in the state to ensure the continuing safety of that environment.").

in state custody have liberty interests that must be protected during state-initiated changes to that custody. *E.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980) (the involuntary transfer of a state prisoner to a mental hospital implicates a liberty interest, and those with diminished capacity have “a greater need for assistance [of counsel] in exercising their rights”); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (providing that revocation of parole impacts liberty interests); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (same with regard to revocation of probation); *see also Minson v. Austin*, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an “atypical and significant hardship” that impacts prisoner’s liberty interests).

Like the federal prison cases, in a dependency action the state may seek to change the kind and type of custodial situation in which a child is living, and it may only do so upon proof of particular circumstances (*e.g.*, maltreatment). This Court should recognize that a child in a dependency proceeding has at least the same liberty interests at stake as a convicted felon facing involuntary changes to the circumstances of his state custody. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir.1987) (*en banc*) (“[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a

mental health facility that the foster child may bring a § 1983 action for violation of fourteenth amendment.”).

Indeed, courts have held that children have substantive and procedural due process rights to remain with their parents. *See Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“The “right of the family to remain together without the coercive interference of the awesome power of the state” is “the most essential and basic aspect of familial privacy.”); *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship. . . .”).

B. Independent legal counsel is necessary to help guard against potential harm and protect children’s interests in dependency proceedings.

1. National experts agree that children in dependency matters require legal counsel.

Dependency proceedings are complex legal processes that often involve expert medical testimony, implicate numerous federal and state laws, and require an understanding of multiple service delivery systems.²⁸ Accordingly, the state relies on counsel to represent its interests, and the Washington Supreme Court recognized more than forty years ago that the “nature of the rights in question” and “the relative power of the

²⁸ See Donald N. Duquette & Ann M. Haralambie, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 166-67 (2nd ed. 2010).

antagonists” in a deprivation proceeding necessitates counsel for the parent. *In re Myricks’ Welfare*, 85 Wn. 2d 252, 255 (1975) (en banc); *see also* RCW § 13.34.090 (codifying this requirement). Despite being the subject of the proceedings, in Washington, the child is the only party to a dependency proceeding without a complete statutory right to counsel, leaving “the most vulnerable” party “powerless and voiceless” in the courtroom. *See In re Parentage of L.B.*, 155 Wn. 2d at 712 n.29.

Scholars, academics, and organizations such as the American Bar Association join *Amici* in advocating in favor of client-directed legal counsel for children in dependency proceedings. The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (“*ABA Model Act*”) unequivocally declares that “providing the child with an independent and client-directed lawyer ensures that the child’s legal rights and interests are adequately protected.”²⁹ Likewise, “[t]he vast majority of legal scholars and authorities who have addressed this issue recommend that a lawyer should

²⁹ American Bar Association, *ABA Model Act*, Section 7 (c), Cmt (2011), http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf (last visited Oct. 5, 2017).

take direction from his or her child client” as long as the child is able “to engage in reasoned decision making.”³⁰

In dependency proceedings, a child requires “a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.”³¹ A child’s participation in the legal process can also assist the child in making better and more informed decisions. *See, e.g., Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 609 (2006); *Model Act* at 7 (citing ABA Model Rule 2.1) (providing that a “lawyer should, without unduly influencing the child, advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that

³⁰ Donald Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 100 (2012). Washington provides that *if* an attorney is appointed to represent a minor in a dependency proceeding, the attorney will represent “the child’s position.” RCW § 13.34.100(6)(f).

³¹ American Bar Association, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (“ABA Standards of Practice”) Standard A-1 (1996), <http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AbuseNeglectStandards.pdf> (last visited Oct. 5, 2017).

a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.”).³²

Legal representation in dependency proceedings helps ensure the integrity of the system by fostering the child’s trust and understanding of the system that is making fundamental decisions about her life. *See In re S.K.-P.*, Pub. Op., No. 48299-1-II (WA Ct. App., Div. II, Aug. 8, 2017). “Many commentators have described the therapeutic nature of the attorney-client relationship for children involved in the child welfare system.”³³ The child who participates in decisions involving his or her own future is more likely to embrace those decisions. *See, e.g.*, ABA Model Act, Report at 21 (“Children who are represented by a lawyer often feel the process is fairer because they had a chance to participate and to be heard. Consequently, children are more likely to accept the court’s decision because of their own involvement in the process.”); *see also* Green and Appell, NEV. L.J. at 578 (“Children need lawyers not simply to promote fair processes and outcomes, but to promote children’s

³² The assistance of a Guardian ad Litem (“GAL”) cannot substitute for legal representation by counsel. GALs serve the court by assisting in determining the best interests of the child, and “are not trained to, nor is it their role to, protect the legal rights of the child.” *MSR*, 174 Wn. 2d at 21; *see also* RCW § 26.44.100 (“The legislature finds . . . children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect.”).

³³ Duquette & Darwall, *supra* note 29 at 92.

autonomy—their right and need to have a say in what happens to them in legal proceedings.”).³⁴

Appointment of counsel also allows for better decision-making, as the court will have a complete record upon which to make a fair decision:

[Courts in dependency proceedings] remain ultimately dependent on the information presented to them. Hearing from a child who wants to participate in his or her court case and who has had effective counsel to understand the legal issues involved, the impact of different decisions, and the scope of possibilities is imperative to sound decision-making by a court. . . .³⁵

As the Court of Appeals noted, at least one study has shown that a child with an attorney at the first dependency hearing is more likely to “to reside with parents, relatives, or other caring adults they know throughout their dependencies.” App. Pet. for Review 30. Independent legal representation for the child—whose future safety and well-being is the very subject of the proceeding—is a necessary component of due process. See *Kenny A.*, 356 F. Supp. 2d at 1361 (concluding that, given the liberty interests at stake, “only the appointment of counsel can effectively

³⁴ Article 12 of the United Nations Convention on the Rights of the Child, adopted in 1989, is in accord, stating that a child shall “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.” The United Nations Convention on the Rights of the Child, <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> (last visited Oct. 11, 2017).

³⁵ *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (3d ed. 2012) at 5 (hereinafter “*First Star Report*”); see also Lucy Johnston-Walsh, et al., *Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania* 17-18 (2010).

mitigate the risk of significant errors in deprivation and [termination] proceedings”).

2. The majority of states require independent legal representation for children’s interests to be adequately represented in dependency proceedings.

The United States Supreme Court has long recognized that children need counsel to effectively navigate complex legal proceedings. *See In re Gault*, 387 U.S. at 38 n.65 (explaining that even “[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot[,]” and holding that children have a due process right to counsel in delinquency proceedings). Likewise, at least thirty-one states and the District of Columbia provide an automatic right to legal counsel for children in dependency proceedings, either by statute, regulation, or rule, and that number is steadily growing.³⁶ The fact that well over half of all states mandate that independent counsel be appointed for children in dependency proceedings is relevant in considering Washington’s obligations to do the same. *See In re Gault*, 387 U.S. at 38-

³⁶ These include Alabama; Arkansas; Colorado; Connecticut; Georgia; Iowa; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Mississippi; Missouri; Nebraska; New Jersey; New Mexico; New York; North Carolina; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; West Virginia; and Wyoming. The District of Columbia also requires representation for children in dependency proceedings.

41 (taking notice of the prevalence of states that passed laws providing for legal representation of children in juvenile court and the significant number of organizations advocating for the same). The importance of providing legal representation to children in dependency proceedings is so great that in some states the child may not waive this right. *E.g.*, MCL § 712A.17c(8) (in a dependency proceeding, “child shall not waive the assistance of a [court-appointed] lawyer-guardian ad litem.”). Since 2007, over 33% of the states surveyed adopted new legislation mandating counsel be appointed for abused and neglected children in dependency proceedings.³⁷ Washington’s duties to its children are identical, and the Court should consider these national trends in evaluating the constitutional issues presented in this case.

V. CONCLUSION

Amici present dispositive national evidence that dependency proceedings pose risks to all children’s fundamental physical liberty interests, and that national trends support appointment of counsel in all dependency cases. *Amici* urge the Court to grant review under RAP 13.4(b)(3) and (4), and address the significant and urgent question

³⁷ In the most recent edition of the First Star Report, Washington state was one of only ten states to receive a failing grade on its record of protecting a child’s right to counsel in dependency cases. *See* First Star Report at 123-24.

presented by this case: children's universal constitutional right to counsel
in dependency proceedings.

Date: October 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2017, a true and correct copy of the foregoing document was filed with the Clerk of Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Laura K. Clinton

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